Filed 6/16/09 In re A.H. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re A.H. et al., Persons Coming Under the Juvenile Court Law.	B212169 (Los Angeles County Super. Ct. No. CK68005)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.G., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Judge. Affirmed.

Merrill Lee Toole; and Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and Fred Klink, Senior Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

A.G. (Mother), who was incarcerated at all times relevant to this appeal, challenges the order terminating her family reunification services.[1] She contends the Department of Children and Family Services (DCFS) did not provide her with reasonable reunification services while she was incarcerated and the juvenile court abused its discretion by failing to continue a contested review hearing on its own motion. Inasmuch as neither of these contentions has merit, we affirm the order terminating Mother's reunification services.

BACKGROUND

On May 1, 2007, a number of law enforcement agencies acting in concert executed multiple search and arrest warrants as part of an investigation of a criminal street gang assault on a 13-year-old girl, who had been forcibly jumped into the Varrio Hawaiian Gardens Gang. Mother was arrested for her involvement in the assault, which law enforcement officers believed took place at her apartment. Mother lived in the apartment with her one and one-half year old daughter and her four-month-old son (the children), as well as two other families. At the time of Mother's arrest, the children's father (Father),[2] was incarcerated for narcotics related offenses.

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[1] In the absence of a companion order setting a selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26, an order terminating or denying family reunification services is appealable independently. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1178-1179; *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1395-1396; *In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1703-1705.)

[2] Father, who is not married to mother or currently in a relationship with her, is not a party to this appeal. The court declared Father to be his daughter's presumed father and his son's biological father.

DCFS took the children into protective custody, placed them in foster care and filed a petition on their behalf pursuant to Welfare and Institutions Code section 300, subdivision (b),[3] alleging that Mother's generational gang involvement, crime and filthy home environment endangered the children. The juvenile court ordered the children detained in shelter care and ordered family reunification services and visitation for both parents. The court directed DCFS "to provide referrals for drug rehabilitation, testing, and victim counseling to the parents."

On June 4, 2007, DCFS filed a first amended petition, adding allegations that Mother's history of drug use endangered the children and that Father's history of drug use and incarceration for a drug-related offense endangered the children.

At the jurisdictional hearing held on June 27, 2007, the court sustained count b-1, as amended, pertaining to Mother's gang activity and counts b-3 and b-4, pertaining to Mother's and Father's drug histories, respectively. Count b-2 alleging that Mother maintained a filthy home was dismissed. The court found the children to be persons described by section 300, subdivision (b), and continued the matter for disposition.

By the time of the contested disposition hearing held on August 8, 2007, DCFS had exercised the discretion granted to it by the juvenile court to place the children with their paternal grandmother, L.O. Mother, who still was in custody, appeared and informed the juvenile court that she had received a three-year state prison sentence. Father, who had been released from custody, was also present.

The court declared the children dependents of the court and placed their care, custody and control with DCFS for suitable placement with their paternal grandmother, L.O. The court ordered family reunification services for both parents. With respect to Mother, the court ordered her to attend and complete DCFS approved programs of parenting education and individual counseling to address case issues including gang lifestyle and its effect on the children. The court also ordered Mother to submit to 10

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[3] All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

weekly random consecutive tests, with the understanding that she complete a drug program if she misses any tests or tests positive. Monitored visitation with the children also was ordered. Court found Mother in compliance with court orders to the extent she could be at her place of incarceration. Court found Father in partial compliance, finding there was a likelihood that the children could be returned within six months.

A report prepared for the six-month review hearing (§ 366.21, subd. (e)) scheduled for December 17, 2007, stated that Mother remained incarcerated at the Century Regional Detention facility in Lynwood, California, but had been moved to the Hi Power Unit, where she was unable to participate in any court-ordered programs. Prior to her transfer to her present location, Mother had completed 13 parenting classes. A deputy in the Los Angeles County Jail Inmate Services unit confirmed that "'Inmate G[.] is placed in a level of security that does not allow her to participate in any services that would satisfy court orders. LA County jail does not provide random drug testing or individual counseling. Parenting class is offered, but this is not available to inmate G[.] due to her security level. Inmate G[.] will remain at this security level for the remainder of her incarceration at LA County Jail.'"

With regard to visitation, L.O. took the children to visit their mother every other week at the county jail facility in Lakewood. Mother agreed to this schedule due to the hardship on the children when making the trip. The visitation area was filthy, and L.O. was not permitted to bring diapers or a stroller when visiting. Both children had had accidents.

Mother was not present at the December 17, 2007 hearing. Mother's counsel informed the court that "the worker did investigate the services and found out that there was nothing they could do while she was there, but she's either going to be or has been transported to [a] statewide facility." Counsel asked that DCFS investigate all possible services for Mother in state prison.

The court found that the children could not be returned to their parents. The court further found by clear and convincing evidence that reasonable services had been provided. The court found Father to be in compliance with his case plan and found

Mother to be in compliance with her case plan to the extent possible at her place of incarceration. Again, the court found there was a likelihood that the children could be returned to parents within the next six months and ordered DCFS to continue to provide parents with family reunification services.

In a report prepared for the 12-month review hearing (§ 366.21, subd. (f)) scheduled for June 18, 2008, DCFS reported that Mother had been transferred to state prison, specifically the Central California Women's Facility in Chowchilla. The children's paternal grandmother sent Mother pictures of the children and accepted collect calls from Mother, who talked to her children twice weekly.

Mother was on a waiting list for parenting class but had been attending Alcoholics Anonymous/Narcotics Anonymous meetings on a weekly basis. Mother hoped to be reunited with her children upon her release from prison in January 2009.

Mother was not present at the 12-month review hearing (§ 366.21, subd. (f)) on June 18, 2008. She was suffering from gallstones and awaiting surgery to have them removed. Mother signed a waiver of her appearance. Although Mother had notice of DCFS's recommendation to terminate her services, her attorney wanted to speak with her. The court therefore continued the matter as to Mother to July 17, 2008, for a contested 12-month review hearing. With regard to Father, who had experienced some difficulty in complying with his case plan, the court found him to be in partial compliance and ordered DCFS to provide him with six more months of reunification services.

On July 17, 2008, Mother was in hospital custody and medically unfit for transportation to court. Counsel informed the court that he had been unable to speak with Mother since she entered the hospital on June 24. Inasmuch as Father was to receive family reunification services until the 18-month date in November 2008, the court saw no harm in continuing Mother's section 366.21, subdivision (f), hearing six weeks to enable her attorney to make contact with her. The court therefore continued the matter to August 21. When counsel's attempts to contact Mother in preparation for the August 21 hearing were unsuccessful, the court continued the matter once again to October 8.

The report prepared for the October 8, 2008 hearing revealed that Mother was no longer in the hospital, but she was waiting to return to the hospital for further surgery to remove a foreign object that had been left in her during her first surgery. Mother had informed the Children's Social Worker (CSW) that she was unsure whether she could attend any hearings that took place before her anticipated December 2008 release date. She did not know when she would have her surgery and did not want to miss having the surgery because she was in court in Los Angeles. According to Mother's prison counselor, "'[Mother] probably doesn't want to attend her hearing in Los Angeles because she doesn't want to miss her operation here at the facility. Inmates are not informed when they are scheduled to have an operation until the last minute as a precautionary measure. We don't want anybody waiting for them at the hospital. If [Mother] were to miss her scheduled operation due to being in Los Angeles, she would need to reschedule. Most inmates want to have all medical services performed while incarcerated as they may not have insurance when they are released.'"

At the October 8, 2008 hearing, Mother's counsel argued only that Mother's medical condition presented an extenuating circumstance that had impeded her ability to avail herself of the services available to her at her place of incarceration. Counsel asked that the court grant Mother additional time to comply with her case plan. Counsel did not state that she had been unable to speak with Mother during the almost seven weeks that elapsed since the August 21 hearing. Counsel did not convey to the court any desire on Mother's part to be present at the hearing, and counsel did not ask for a continuance of the hearing.

The court terminated Mother's reunification services, finding that "return of the children to the physical custody of the mother creates a substantial risk of detriment to their physical and or mental health." The court further found "by clear and convincing evidence that reasonable services have been provided to the mother to reunify with the children and to the children to plan towards permanence. The mother's complied to the extent she could at her place of incarceration in light of her medical condition, but there's not a likelihood or probability of return to mother by the 18 month date. [¶] November

4[, 2008] is the 18 month date and she is not getting out until December, not to mention once she gets out, even if she had done programs in custody, she would still need to show stability while she's out of custody and be doing some clean tests. Family reunification services are terminated for the mother." This appeal followed.

DISCUSSION

A. *Reunification Services*

Mother contends DCFS failed to provide her with reasonable family reunification services. We disagree.

A finding that reasonable family reunification services have been provided to a parent will be upheld if supported by substantial evidence. (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 971; *In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1361-1362.) The burden of demonstrating the absence of substantial evidence rests with the parent. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251; *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

The requirement that DCFS provide services to an incarcerated parent applies only to services that are available. (§ 361.5, subd. (e).) No services were available to Mother while she was incarcerated in the Hi Power Unit at county jail. While in state prison, the only court-ordered program available was parenting for which Mother placed herself on the waiting list. While Mother took the initiative to attend Alcoholics Anonymous/Narcotics Anonymous meetings, the juvenile court had not ordered her to do so. During the time that Mother was in hospital custody, no services were available to her. It follows, then, that Mother's inability to comply with her case plan was not the fault of DCFS. Rather, it is unfortunately attributable to the unavailability of needed services in her place of incarceration.

To be sure, Mother complied with her case plan to the extent she could at all times during this dependency proceeding. In fact, Mother commenced her reunification efforts well before the disposition hearing, evincing her strong desire to reunify with her

children. By the time of Mother's section 366.21, subdivision (f), hearing on October 8, 2008, however, the 18-month date of November 4, 2008 was less than one month away, leaving insufficient time for Mother to comply fully with her case plan. Moreover, Mother was not scheduled to be released from prison until December 2008. Thus, even if Mother had been able to comply with all court orders while incarcerated, the children still could not have been returned to her by the 18-month date, necessitating the termination of her reunification services.

Mother contends DCFS should have been more creative and provided her with books on parenting and self-help, after which she could have been tested by taking a multiple choice examination. In addition, Mother maintains that DCFS should have inquired whether prison officials would allow her to take classes via the Internet. In the absence of evidence that DCFS made such efforts, Mother maintains the juvenile court's finding that reasonable services had been provided cannot stand. We are not convinced.

Mother cites no authority which would have allowed DCFS to substitute such non-court-ordered services for those services which had been ordered but which were unavailable to an incarcerated parent. Individual counseling by its very nature requires face to face interaction with a therapist or counselor. Mother could not comply with the court's order for individual counseling by reading books or via the Internet. The input of a therapist was essential to a determination of whether Mother had overcome, or was on the road to overcoming, the reasons necessitating juvenile court intervention. Similarly, drug testing cannot be done online. Consequently, we reject Mother's contention that DCFS failed to provide her with reasonable family reunification services.

B. *Continuance*

Mother contends the juvenile court's failure to continue the October 8, 2008 hearing on its own motion constitutes an abuse of discretion. She maintains that her medical condition and DCFS's failure to obtain a removal order ensuring her appearance at the hearing restricted her attorney's ability to communicate with her regarding the case, necessitating a further continuance. The premise underlying Mother's contention—i.e.,

her attorney had been unable to communicate with her prior to the October 8 hearing—finds no support in the record.

As previously detailed, the juvenile court continued the 12-month review hearing as to Mother's issues (§ 366.21, subd. (f)), on three occasions (June 18, July 17, and August 21, 2008). Each continuance was granted only after Mother's attorney informed the court that Mother's medical condition and hospitalization had precluded counsel from communicating with Mother.

By the time of the October 8 hearing, Mother was no longer in the hospital. She was, however, waiting to return to the hospital for a second surgery to remove an object that had been left in her inadvertently during her first surgery. At no time during this hearing did Mother's counsel claim that she had not been able to speak with Mother during the almost seven weeks that elapsed since the previous hearing on August 21. Counsel did not state that Mother wished to be present[4] or ask for a continuance for any reason. Counsel simply asserted that Mother's medical condition presented an extenuating circumstance that had impeded her ability to avail herself of the services at her place of incarceration. Counsel only asked that the court grant Mother additional time to comply with her case plan.

Mother cites a number of cases involving challenges to a court's denial of a request for continuance. No such request was made in this case, and none of the cases

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[4] On August 21, 2008, when the juvenile court continued the Mother's contested section 366.21, subdivision (f), hearing to October 8, 2008, the court ordered DCFS to prepare a statewide removal order for Mother. There is a question as to whether DCFS complied with this directive. The removal order could not be located in the superior court file, and the clerk of the superior court was unable to obtain a copy of the removal order from the CSW. On a facsimile coversheet addressed to a superior court employee, CSW Anthony Vaca advised the trial court that he "could not locate the in/out for mother . . . for the 10/08/08 [court] date. At the time mother was awaiting surgery and I spoke to her and her counselor, both stated [Mother] did not want to attend [court] and risk not having her surgery." In any event, Mother concedes that she did not have a statutory right to be transported to court. (Pen. Code, § 2625; *In re Jesusa V.* (2004) 32 Cal.4th 588, 599; *In re Barry W.* (1993) 21 Cal.App.4th 358, 369-370.)

cited by Mother compels the conclusion that the juvenile court had a sua sponte obligation to order a continuance under the particular circumstances presented in this case. Mother has failed to demonstrate that the juvenile court abused its discretion in failing to continue the October 8 hearing on its own accord.

DISPOSITION

The order is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.